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EFFECTIVE REMEDIES AS A FUNDAMENTAL RIGHT

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The importance of effective domestic remedies from a human rights perspective

Article 13 of the European Convention on Human Rights (ECHR) provides that ‘everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity’. A similar provision is to be found in Article 47 of the EU Charter of Fundamental Rights: “Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article”.

The primary aim of these provisions is to increase judicial protection offered to individuals who wish to complain about an alleged violation of their human rights. In that sense, the right to an effective remedy is an essential pre-condition for an effective human rights policy.

At the same time, these provisions are the embodiment of the principle of subsidiarity. This principle is one of the underlying foundations of the Convention mechanism. Domestic authorities of the High Contracting Parties to the ECHR have the primary duty to guarantee Convention rights and freedoms, whilst the Court serves as a ‘safety net’. Article 13 of the Convention has therefore “close affinity” with Article 35 paragraph 1 of the Convention. The respondent State ‘must first have an opportunity to redress the situation complained of by its own means and within the framework of its own domestic legal system’.¹ The Court may only deal with the matter after all domestic remedies have been exhausted insofar as “that rule is based on the assumption, reflected in Article 13 of the Convention [...] that there is an

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¹ See EComHR *Fifty-seven inhabitants of Louvain v. Belgium*, appl. no. 1994/63, in the Yearbook of the ECHR 1964, at 252.

effective remedy available in the domestic system in respect of the alleged breach”. However, “the only remedies which Article 35 paragraph 1 requires to be exhausted are those that relate to the breach alleged and are available and sufficient. The existence of such remedies must be sufficiently certain, not only in theory but also in practice”.

Providing effective domestic remedies allows the European Court to fulfil its supervisory role and should permit a reduction in the Court’s workload. Repetitive cases generally reveal a failure to implement effective domestic remedies where judgments given by the Court, particularly pilot judgments or judgments of principle, have given indications as to the general measures needed to avoid future violations. As the Court has noted, if States fail to provide effective remedies, “individuals will systematically be forced to refer to the Court in Strasbourg complaints that would otherwise ... have to be addressed in the first place within the national legal system. In the long term the effective functioning, on both the national and international level, of the scheme of human rights protection set up by the Convention is liable to be weakened”. The implementation of effective domestic remedies for violations of the Convention has been a long-standing concern of the Council of Europe. The Committee of Ministers has also dealt with the right to an effective remedy in Recommendations Rec(2004)6 on the improvement of domestic remedies and CM/Rec(2010)3 on effective remedies for excessive length of proceedings, which was accompanied by a guide to good practice. The issue has likewise been considered at the highest political level, notably at the High-Level Conferences on the Future of the Court held in turn by the Swiss Chairmanship of the Committee of Ministers (Interlaken, Switzerland, 18-19 February 2010), the Turkish Chairmanship (Izmir, Turkey, 26-27 April 2011)⁷ and the UK Chairmanship (Brighton, United Kingdom, 19-20 April 2012). The Declaration adopted at the Brighton Conference, for example, expressed in particular “the determination of the States Parties to ensure effective implementation of the Convention” by “considering the introduction if necessary of new domestic legal remedies, whether of a specific or general nature, for alleged violations of the rights and freedoms under the Convention”, and also by “enabling and encouraging national courts and tribunals to take into account the relevant principles of the Convention, having regard to the case law of the Court, in conducting proceedings and formulating judgments; and in particular enabling litigants, within the appropriate parameters of national judicial procedure but without unnecessary impediments, to draw to the attention of national courts and tribunals any relevant provisions of the Convention and jurisprudence of the Court”.

Further to these two provisions, the Declaration invited the Committee of Ministers “to prepare a guide to good practice in respect of domestic remedies”.

Some introductory comments concerning the substantive meaning of the right to an ‘effective remedy’

Article 13 ECHR

In early case-law of the Convention bodies, Article 13 ECHR did not receive a lot of attention. The Court would very often find a violation under a separate provision of the ECHR (for example, Article 6) and subsequently rule that it was not necessary to also examine the applicant’s case under Article 13.

This approach was criticised right from the Airey judgment. In their dissenting opinion judges O’Donoghue, Thor Vilhjálmsson and Evrigenis state that the Court in their opinion should have examined the complaint under Article 13 ECHR. A few years later this criticism was voiced again by judges Pinheiro Farinha and De Meyer in their separate opinion in the W, B and R v. United Kingdom case:

We are not quite sure that such examination [under Article 13 ECHR, MK] was made superfluous by the finding of a violation, in the case of the applicant, of the entitlement to a hearing by a tribunal within the meaning of Article 6 §1. Are the ‘less strict’ requirements of Article 13 truly ‘absorbed’ by those of Article 6 §1? Do these provisions really ‘overlap’? It appears to us that the relationship between the right to be heard by a tribunal, within the meaning of Article 6 §1, and the right to an effective remedy before a national authority, within the meaning of Article 13, should be considered more thoroughly.²

Also in the literature there has been a considerable amount of criticism. Barkhuysen has enumerated the various points of criticism.³ First of all, the Court did not properly examine

² ECtHR 8 July 1987, W, B and R v. United Kingdom (Series A-121).

³ T. Barkhuysen, *Artikel 13 ECHR: effectieve nationale rechtsbescherming bij schending van mensenrechten* (thesis Leiden University), Lelystad: Koninklijke Vermande, 1998, pp. 188-190.

whether there was indeed in a specific case overlap between the complaint under Article 6 and the complaint under Article 13. The Court more or less automatically reached the conclusion that it was not necessary to examine the applicant's case under both provisions which was not necessarily justified. A complaint under Article 13 might be of a different nature than the one made by an applicant under Article 6. Secondly, the *lex specialis* approach of the Court was only justified if the Court would thoroughly examine in its test under Article 6 whether there had been a lack of remedies. The Court did not consistently do this. In Barkhuysen's opinion applicability of Article 6 §1 in a given case did not automatically rule out the applicability of Article 13.

The more autonomous role of Article 13 was highlighted by the Court in its 2000 judgment in the case of *Kudla v Poland*.⁴ The Court announced that 'the time has come to review its case-law in the light of the continuing accumulation of applications before it in which the only, or principal, allegation is that of a failure to ensure a hearing within a reasonable time in breach of Article 6 § 1'. The Court then proceeded to stress the autonomous importance of Article 13 of the Convention:

The question of whether the applicant in a given case did benefit from trial within a reasonable time in the determination of civil rights and obligations or a criminal charge is a separate legal issue from that of whether there was available to the applicant under domestic law an effective remedy to ventilate a complaint on that ground. ... [T]he Court now perceives the need to examine the applicant's complaint under Article 13 taken separately, notwithstanding its earlier finding of a violation of Article 6 § 1 for failure to try him within a reasonable time.⁵

The 'upgrading' of Article 13 was therefore a direct result of the quantity of 'length of proceedings' cases before the Court. Or, as the Court phrased it in the *Scordino* judgment, 'the reason [the Court] has been led to rule on so many length-of-proceedings cases is because certain Contracting Parties have for years failed to comply with the 'reasonable time' requirement under Article 6 § 1 and have not provided a domestic remedy for this type of complaint'.⁶ The growing importance of effective domestic remedies was underlined as well

⁴ *Kudla v Poland*, Judgment of 26 October 2000, appl. no. 30210/96.

⁵ *Ibidem*, paras. 147-149.

⁶ *Scordino v Italy (No. 1)*, Judgment of 29 March 2006, appl. no. 36813/97, paras 174-175.

by the Heads of State and Government in their Action Plan from the Third Summit of the Council of Europe which was held in May 2005.⁷

The “authority” does not necessarily have to be a judicial authority, but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy is “effective”. The authority needs to be competent to take binding decisions (which means that an Ombudsman would not meet the required standards). Also, even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so.

The Court demands a domestic remedy to deal with the substance of an “arguable complaint” under the Convention. Article 13 does not require a domestic remedy in respect of any supposed grievance, no matter how unmeritorious; the claim of a violation must be an arguable one. The question of whether the claim is arguable should be determined in the light of the particular facts and the nature of the legal issue or issues raised.

Likewise, the domestic remedy should be able to grant appropriate relief. The latter condition is to say that the ‘authority’ needs to be competent to take binding decisions (which means that an Ombudsman does not meet the required standards) and that it should be competent to order restitutio in integrum or award damages. Likewise, the notion of an effective remedy under Article 13 requires that the remedy may prevent the execution of measures that are contrary to the Convention and whose effects are potentially irreversible.⁸

The remedy required by Article 13 needs to be “effective” in practice as well as in law. Its effectiveness does not, however, depend on the certainty of a favourable outcome for the applicant.

Article 47 EU Charter

Article 47, paragraph 1, of the EU Charter is based on Article 13 ECHR. However, the protection offered by the EU Charter is more extensive since it guarantees the right to an

⁷ CM(2005)80 final, p. 1 (to be found on the website of the Council of Europe: http://www.coe.int/t/der/docs/WarsawActionPlan2005_en.pdf).

⁸ *Ibid.*

effective remedy before a court. The Court of Justice enshrined that right in its judgment of 15 May 1986 as a general principle of Union law (Case 222/84 *Johnston* [1986] ECR 1651; see also judgment of 15 October 1987, Case 222/86 *Heylens* [1987] ECR 4097 and judgment of 3 December 1992, Case C-97/91 *Borelli* [1992] ECR I-6313). According to the Court, that general principle of Union law also applies to the Member States when they are implementing Union law. The inclusion of this precedent in the Charter has not been intended to change the system of judicial review laid down by the Treaties, and particularly the rules relating to admissibility for direct actions before the Court of Justice of the European Union. Article 47 applies to the institutions of the Union and of Member States when they are implementing Union law and does so for all rights guaranteed by Union law.

The reference to ‘everyone’ in Article 47 specifies the jurisdictional scope of the provision; it is a right guaranteed for everyone within the jurisdiction of a Member State of the European Union. It is applicable in relation to ‘rights and freedoms guaranteed by the law of the Union’. The right to judicial review is not subsidiary to other Charter rights in the way of Article 13 ECHR. Further, the requirement for judicial review and possibility for reparation exists equally for social and economic rights protected either by the Charter directly or governed measures of Community law. The principle of ‘effective judicial review’ presupposes in general that the court to which a matter is referred may require the competent authority to notify its reasons for its decision (see the before mentioned *Heylens* case). Each case raising the question whether a national procedural provision renders the application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. Therefore the basic principles of the domestic judicial system, such as the protection of the rights of defence, the principle of legal certainty and the proper conduct of procedure, can be scrutinised by the ECJ in the context of the application of the principle of effectiveness. The principle of effective judicial protection may require national courts to review all legislative measures and to grant interim relief where appropriate even when there is no relevant national provisions on which such relief may be based. In the words of Advocate General Geelhoed “A system of legal remedies should be established in such a way that it makes provision to prevent, so far as possible, damage arising or at least to limit the extent of the damage. To put in other words: it cannot be correct to construe the provisions of the EC Treaty guaranteeing judicial access in such a way as to exclude the possibility to individuals to limit

such damage”.⁹

Specific characteristics of remedies in response to certain particular situations

Domestic remedies in respect of alleged violations of Articles 2 and 3

Article 2 (the right to life) and Article 3 (the prohibition of torture) contain procedural obligations for the State to conduct an effective investigation. I will not dwell on the requirements for such an investigation since it largely falls outside the scope of this lecture.¹⁰ Suffice it to say that the Court has indicated that “Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible, including effective access for the complainant to the investigation procedure”.¹¹ When the investigation is ineffective, this ineffectiveness undermines the effectiveness of other remedies, including the possibility of bringing a civil action for damages. In principle this is also true for cases concerning medical negligence if the liability is based on a medical error made by the individual in question.

Domestic remedies against removal

Article 13 of the Convention, combined with Articles 2 and 3, requires that the person concerned have the right to a suspensive remedy for an arguable complaint that his/her expulsion would expose him/her to a real risk of treatment contrary to Articles 2 or 3 of the Convention.¹²

⁹ Opinion in Case C-491/01.

¹⁰ See M. Kuijer, “Geweldgebruik door de politie en de jurisprudentie van het Europees Hof voor de Rechten van de Mens”, in: Borgers, Duker & Stevens (eds.), *Politie in beeld*, Nijmegen: Wolf Legal Publishers, 2009.

¹¹ See, for example, ECtHR 21 June 2011, *Isayev v. Russia* (appl. no. 43368/04), § 186-187; ECtHR 13 June 2002, *Anguelova v. Bulgaria* (appl. no. 38361/97), § 161; ECtHR 28 March 2000, *Mahmut Kaya v. Turkey* (appl. no. 22535/93), § 107; ECtHR [GC] 13 December 2012, *El-Masri v. “the former Yugoslav Republic of Macedonia”* (appl. no. 39630/09), § 255; and ECtHR 6 April 2000, *Labita v. Italy* (appl. no. 26772/95), § 131.

¹² ECtHR [GC] 13 December 2012, *De Souza Ribeiro v. France* (appl. no. 22689/07), § 82.

The effectiveness of a remedy also requires close scrutiny by domestic authorities¹³ and a particular promptness. Likewise, the effectiveness of a remedy may be undermined if a removal takes place with undue haste. The Court has for example considered that the expulsion of an applicant one working day after notification of the decision rejecting the asylum application had in practice deprived him of the possibility of introducing an appeal against the negative decision.¹⁴ Equally important is that the person can effectively participate in the judicial proceedings, i.e. access to information, access to organisations offering legal advice and access to interpretation.

As regards accelerated asylum procedures, the Court has recognised that they may facilitate the treatment of clearly abusive or manifestly illfounded applications, and considered that the re-examination of an asylum application by a priority process does not deprive a detained nonnational of an effective remedy per se, so long as an initial application had been subject to a full examination in the context of a normal asylum procedure.

In Sweden, matters concerning the right of aliens to enter and remain in Sweden are dealt with by three instances: the Migration Board, the Migration Court and the Migration Court of Appeal. The applicants are entitled to be represented before these bodies by a lawyer appointed by the Migration Board. The entire proceedings have suspensive effect.

Domestic remedies in respect of deprivation of liberty

The main purpose of Article 5 of the Convention is to protect persons from arbitrary or unjustified detention. Article 5 is applicable in numerous situations, for example placement in a psychiatric or social care institution, confinement in airport transit zones, questioning in a police station or stops and searches by the police, or house arrest. Domestic remedies in respect of deprivation of liberty must concern both the measure's lawfulness and the conditions of detention, including the way in which the person in detention is treated.

(i) *the lawfulness of deprivation of liberty*

¹³ ECtHR 12 April 2005, *Shamayev v. Georgia and Russia* (appl. no. 36378/02), § 448.

¹⁴ ECtHR 15 May 2012, *Labsi v. Slovakia* (appl. no. 33809/08), § 139.

Let us first look at the right that is contained in Article 5, paragraph 3 of the Convention, i.e. the right for persons arrested or detained on the grounds that they are suspected of having committed a criminal offence to be brought before a judge promptly and to have their case heard within a reasonable time or to be released pending trial. The Article does not provide for any possible exceptions to the obligation to bring a person before a judge promptly after his or her arrest or detention. Review must be automatic and cannot depend on an application being made by the detained person. The same might also be true of other vulnerable categories of arrested persons, such as the mentally frail or those who do not speak the language of the judge. If there are no reasons justifying the person's detention, the judge must be empowered to order his or her release. National courts are equally required to regularly review whether the circumstances still justify deprivation of liberty after a certain lapse of time. It is contrary to the safeguards set out in this provision more or less automatically to continue to hold a person in detention.

Let me then turn to Article 5, paragraph 4 which provides that “everyone who is deprived of his liberty [...] shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful”. Arrested or detained persons are entitled to request that a court reviews the procedural and substantive conditions of detention. Article 5, paragraph 4, contains special procedural safeguards that are distinct from those set out in Article 6 of the Convention. It constitutes a *lex specialis*. The proceedings referred to in Article 5, paragraph 4, must be of a judicial nature and offer certain procedural safeguards appropriate to the nature of the deprivation of liberty in question. A hearing is required in the case of a person who is held in pre-trial detention. The possibility for a detainee to be heard either in person or, where necessary, through some form of representation is a fundamental safeguard. The Convention does not require that a detained person be heard every time he or she appeals against a decision extending detention, although there is a right to be heard at reasonable intervals. The proceedings must be adversarial and must always ensure “equality of arms” between the parties. In the event of pre-trial detention, persons deprived of liberty must be given a genuine opportunity to challenge the elements underlying the accusations against them. This requirement means that the court could be called to hear witnesses or to grant the defence access to documents in the investigation file. Special procedural safeguards may be necessary to protect those who, on account of their mental disorders, are not fully capable of acting for themselves. For persons who are declared deprived of their legal capacity and can therefore

not oversee their detention personally, an automatic judicial review must be required. What is meant by the word ‘speedy’? In verifying whether the requirement of a speedy judicial decision has been met, the Court may take into consideration the complexity of the proceedings, their conduct by the domestic authorities and by the applicant and what was at stake for the latter.

Concerning placement and prolongation of detention in a deportation centre, the Court considered that the fact that the Estonian domestic courts prolong the person’s detention every two months, assessing the feasibility of expulsion and the steps taken by the authorities to achieve it, provided an important procedural guarantee for the applicant.

In Romania, during trial, the competent judicial authority verifies *ex officio* every 60 days if the circumstances still justify the deprivation of liberty. If the competent judicial authority finds the detention to be unlawful or no longer necessary, it revokes the measure and orders immediate release.

(ii) *The right to compensation for unlawful detention*

According to Article 5, paragraph 5, of the Convention, “everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation”. The right to compensation presupposes that a violation of one of the other paragraphs of Article 5 has been established by either a domestic authority or the Court itself. It creates a direct and enforceable right to compensation before the national courts. In order to amount to an effective remedy, an award of compensation for unlawful detention must not depend on the ultimate acquittal or exoneration of the detainee. The national authorities must interpret and apply their national law without excessive formalism. For example, although Article 5, paragraph 5, does not prohibit the Contracting States from making the award of compensation dependent upon the ability of the person concerned to show damage resulting from the breach, excessive formalism in requiring proof of non-pecuniary damage resulting from unlawful detention is incompatible with the right to redress. The amount of compensation awarded cannot be considerably lower than that awarded by the Court in similar cases. Finally, crediting a period of pretrial detention towards a penalty does not amount to compensation as required by Article 5, paragraph 5.

(iii) *Unacknowledged detention*

Unacknowledged detention of a person constitutes a particularly grave violation of Article 5 of the Convention. “[W]here the relatives of a person have an arguable claim that the latter has disappeared at the hands of the authorities, the notion of an effective remedy for the purposes of Article 13 entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory procedure”. The Court considers that “seen in these terms, the requirements of Article 13 are broader than a Contracting State’s obligation under Article 5 to conduct an effective investigation into the disappearance of a person who has been shown to be under their control and for whose welfare they are accordingly responsible”.

(iv) *Remedies relating to alleged violations of Article 3 in the context of deprivation of liberty*

Deprivation of liberty is closely related to detention conditions which are dealt with by the Court under Article 3 of the Convention. The Court has clarified that “preventive and compensatory remedies must coexist and complement each other”¹⁵, i.e. an exclusively compensatory remedy cannot be considered sufficient. One should be mindful of the fact that the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation.¹⁶

As for the preventive remedies the following may be said. The remedy must be capable of preventing the continuation of the alleged violation and of ensuring that the applicant’s material conditions of detention will improve. This principle is also applicable to conditions of confinement in a psychiatric ward. If a person complains about lack of adequate (medical) care, the preventive remedy must ensure timely relief. The required speediness will be much more stringent where there is a risk of death or irreparable damage to health. The authority responsible need not be judicial. It should however be competent to verify the alleged violations, with the participation of the complainant, be independent, and issue binding and

¹⁵ ECtHR 10 October 2012, *Ananyev and Others v. Russia* (appl. nos. 42525/07 and 60800/08), § 98.

¹⁶ ECtHR [GC] 27 June 2000, *Salman v. Turkey* (appl. no. 21986/93), § 100.

enforceable decisions, such as the Complaints Commission (*beklagcommissie*) in the Netherlands. The requirement of speediness is equally important with regard to complaints concerning the imposition of disciplinary measures such as placement in a disciplinary cell.

In Romania, from June 2003, Government Emergency Ordinance No. 56/2003 introduced an appeal before the courts against any act of the prison authorities. The Ordinance was subsequently replaced by Law No. 275/2006. To the extent that a prisoner's claim concerned deficiencies in providing adequate care or adequate food, medical treatment, right to correspondence or other rights of detainees, the Court held that the complaint represents an effective domestic remedy. This remedy was deemed effective even in a situation in which, at the date of the entry into force of the Ordinance, an application had already been pending with the Court.

As for compensatory remedies, everyone should be able to obtain compensation. However, mere damages do not provide an effective remedy if the appellant is still in prison. It is important that applicants must not bear an excessive burden of proof. They may be asked to produce readily accessible items of evidence, such as a detailed description of the conditions of detention, witness statements and replies from supervisory bodies. Equally important is that the cost of such proceedings must not place an excessive burden on the applicant and that an award of compensation is not made conditional on the establishment of fault on the part of the authorities. For example, by exonerating the State of all responsibility by declaring that the conditions of detention were caused not by shortcomings on the part of the authorities but rather by a structural problem, such as prison overcrowding or insufficient resources. The remedy must also provide in compensation for non-material damage; the amount of compensation must be comparable to the amounts awarded by the European Court. Redress may also be provided by a reduction of sentence as long as the domestic courts expressly recognise the violation and apply the reduction in a measurable manner.

The issue of the prison overcrowding in Poland has given rise to a series of rulings of principle. In 2007, the Polish Supreme Court for the first time recognised a prisoner's right to bring proceedings against the State based on the Civil Code with a view to securing compensation for infringement of his fundamental rights caused by prison overcrowding and general conditions of detention. The Supreme Court reaffirmed this principle in 2010 and laid down additional guidelines on the manner in which civil

courts should verify and assess the justification of restrictions of the legal minimum space in a cell. The Strasbourg Court consequently considered that the remedy allowing awards of compensation was effective.¹⁷

Effective remedies for excessive length of proceedings

In the *Scordino* judgment, the Court gave some guidance:

Different types of remedy may redress the violation appropriately. The Court has already affirmed this in respect of criminal proceedings, where it was satisfied that the length of proceedings had been taken into account when reducing the sentence in an express and measurable manner. Moreover, some States, such as Austria, Croatia, Spain, Poland and Slovakia, have understood the situation perfectly by choosing to combine two types of remedy, one designed to expedite the proceedings and the other to afford compensation. However, States can also choose to introduce only a compensatory remedy, as Italy has done, without that remedy being regarded as ineffective. ... [T]he Contracting States are afforded some discretion as to the manner in which they provide individuals with the relief required by Article 13 and conform to their Convention obligation under that provision.¹⁸

The Court reiterated that position in the later Grand Chamber judgment in *McFarlane v Ireland*:

Article 13 also allows a State to choose between a remedy which can expedite pending proceedings or a remedy post factum in damages for delay that has already occurred. While the former is preferred as it is preventative of delay, a compensatory remedy may be regarded as effective when the proceedings have already been excessively long and a preventative remedy did not exist.¹⁹

¹⁷ ECtHR [dec] 12 October 2010, *Latak v. Poland and Lominski v. Poland* (appl. nos. 52070/08 and 33502/09), subsequent to the pilot judgments in ECtHR 22 October 2009, *Orchowski v. Poland and Norbert Sikorski v. Poland* (appl. nos. 17885/04 and 17559/05).

¹⁸ *Scordino v. Italy (No. 1)*, Judgment of 29 March 2006, appl. no. 36813/97, paras 186-188.

¹⁹ *McFarlane v. Ireland*, Judgment of 10 September 2010, appl. no. 31333/06, para 108.

We should therefore look at two types of remedies: the ‘preventive’ remedy and the ‘compensatory’ remedy. Prevention is – as always – the best solution. Preferably, there should be a remedy in place designed to expedite the proceedings in order to prevent them from being excessively lengthy. However, there is very little in the Court’s case-law to shed light on how such a preventive remedy could look like. As for the compensatory remedy, the Court’s case-law can be summarised as follows:

- If there has been a violation of the reasonable time requirement as set out in Article 6, there should be a finding of such a violation by the domestic authority which is binding;
- The remedy needs to be ‘effective, adequate and accessible’, i.e. excessive delays in an action for compensation will affect whether the remedy can be considered ‘adequate’.²⁰ Likewise, the ‘accessibility’ of the remedy could be affected by the rules regarding legal costs.²¹
- There should be ‘appropriate and sufficient’ redress, which means *inter alia* that the compensation should be paid without undue delay (i.e. six months from the date on which the decision awarding compensation became enforceable).²² In addition, the amount of compensation paid by the domestic authority should not vary too much from the standards concerning financial compensation developed by the European Court.²³ However, in some cases, the length of proceedings may result in only minimal non-pecuniary damage or no non-pecuniary damage at all. The domestic courts will then have to justify their decision by giving sufficient reasons.²⁴
- Basic principles of ‘fairness’ guaranteed by Article 6 of the ECHR should be respected by the domestic authority in the compensatory proceedings.²⁵

Effective remedies for non-execution of domestic court decisions

Access to a court, as protected by Article 6 of the Convention, encompasses the right to have a court decision enforced without undue delay. Violations due to non-execution of domestic court decisions, in particular those against the State itself, are amongst the most frequent types

²⁰ see *Scordino*, § 195.

²¹ see *Scordino*, § 201.

²² *Scordino*, § 198. Certain countries, such as Slovakia and Croatia, have stipulated a time-limit in which payment should be made, namely two and three months respectively.

²³ see *Scordino*, § 206.

²⁴ see *Scordino*, § 204.

²⁵ see *Scordino*, § 200.

found by the Court. A remedy that expedites enforcement is to be preferred. “[The] burden to comply with such a judgment lies primarily with the State authorities, which should use all means available in the domestic legal system in order to speed up the enforcement, thus preventing violations of the Convention.”²⁶

Although an expeditory approach is to be preferred, the Court has accepted that States can also choose to introduce only a compensatory remedy, without that remedy being regarded as ineffective. The effectiveness of such a remedy depends on satisfaction of the following requirements²⁷:

- an action for compensation must be heard within a reasonable time;
- the compensation must be paid promptly and generally no later than six months from the date on which the decision awarding compensation becomes enforceable;
- the procedural rules governing an action for compensation must conform to the principle of fairness guaranteed by Article 6 of the Convention;
- the rules regarding legal costs must not place an excessive burden on litigants where their action is justified;
- the level of compensation must not be unreasonable in comparison with the awards made by the Court in similar cases.

There is a strong presumption that excessively long proceedings will warrant non-pecuniary damage, especially in the event of excessive delay in enforcement by the State of a judgment delivered against it. The effectiveness of the remedy is equally dependant on the existence of an automatic indexation of and default interest on delayed payments.

General domestic remedies

A general remedy is one intended to redress a violation of a Convention right or freedom by a public authority, without being limited in application to any particular factual or legal context. Article 13 does not as such require that States Parties provide such a general remedy. It would appear possible to distinguish two broad types of general domestic remedies: on the one hand, the possibility for individuals in certain States Parties to rely on the provisions of the

²⁶ ECtHR 15 January 2009, *Burdov v. Russia* (No. 2) (appl. no. 33509/04), § 98.

²⁷ *Ivanov*, paragraph 99.

Convention before any judge in the course of litigation; and on the other, constitutional complaints. A form of general remedy may be seen in the fact that the Convention may be pleaded as a source of applicable law before several or even all courts or tribunals for the determination of a case.²⁸ Such a system allows allegations of violation of Convention rights to be resolved at an early stage in proceedings, potentially without the need for appeal to higher courts on points of Convention law, whilst remaining subject to review, where necessary, by superior domestic courts.

Constitutional complaints

In many member States, it is possible to apply to the national constitutional court for remedy of an allegation of violation of a right protected under the national constitution.²⁹ General remedies may play an important role in providing an effective remedy in situations where no specific remedy exists. Such remedies are recognised as being effective in the sense of Article 13 of the Convention when the rights protected by the constitution explicitly include or correspond in substance to Convention rights. The Court has stated that, “as regards legal systems which provide constitutional protection for fundamental human rights and freedoms ... it is incumbent on the aggrieved individual to test the extent of that protection”. A constitutional complaint may be ineffective as a remedy where it relates only to legislative provisions and not decisions of ordinary courts. Likewise, the Court found that a domestic requirement limiting the scope of the constitutional complaint to the points of law arguable before the Supreme Court “resulted in an actual bar to examination of the applicant’s substantive claims” by the constitutional court. Generally speaking, to be considered an effective remedy, a constitutional complaint must be directly accessible by individuals. The Court has thus refused to consider, for example, the exceptional constitutional remedy available in Italy as an effective remedy, insofar as only the judge may seize the constitutional court, either ex officio or at the request of one of the parties: “in the Italian legal system an

²⁸ For example in Austria (due to the constitutional status of the Convention in Austria, the Austrian authorities and courts must take account of the Convention and the Court’s case law), Ireland (European Convention on Human Rights Act 2003, section 3; this remedy, before the Circuit and High Courts, is available when no other is, and to that extent may be considered subsidiary), the Netherlands (Articles 93 and 94 of the Constitution ensure that Convention rights may be invoked before all domestic courts and that Convention rights have preference), Norway (Act on the Strengthening of the Position of Human Rights in Norwegian Law 1999, section 3), the United Kingdom (Human Rights Act 1998).

²⁹ For example in the Czech Republic, Germany, Latvia, the Slovak Republic, Slovenia, Spain and Turkey. See also a comparative study conducted for the European Commission for Democracy through Law (Venice Commission) in 2008; doc. CDL-JU(2008)026, 7 November 2008.

individual is not entitled to apply directly to the constitutional court for review of a law's constitutionality. Only a court trying the merits of a case has the right to make a reference to the constitutional court, either of its own motion or at the request of a party. Accordingly, such an application cannot be a remedy whose exhaustion is required under Article 35 of the Convention".³⁰ In order for the constitutional complaint procedure to constitute an effective remedy in the sense of Article 13 of the Convention, it must also provide effective redress for a violation. The constitutional court may therefore be equipped with a range of powers. These often include to declare the existence of a violation; quash the impugned decision, measure or act; where the violation is due to an omission, order the relevant authority to take the necessary action; remit the case to the relevant authority for further proceedings, based on the findings of the constitutional court; order payment of compensation; and/or order restitutio in integrum. To give one example in the field of excessively lengthy proceedings. Where a constitutional court's powers are limited to a declaration of unconstitutionality and a request to the court concerned to expedite or conclude the proceedings, without the possibility of ordering specific acceleratory measures or awarding compensation, and where the actual impact of the request on subsequent proceedings is uncertain, a constitutional complaint may be ineffective.³¹ It is not necessary for the constitutional court itself to provide relief in the individual case. A "two-step" approach may suffice, whereby the complainant may request that the procedure in his/her case before the lower court be reopened or otherwise revised in accordance with the principles set out in the constitutional court judgment finding a violation. The "aggregate" of remedies provided for under domestic law may amount to an effective remedy in the sense of Article 13 of the Convention.

The "right to individual petition before the constitutional court" was introduced in the Turkish legal system following constitutional amendments of September 2010. The constitutional court started receiving applications under this provision as of 23 September 2012.

Direct invocation of the provisions of the Convention in the course of ordinary remedy proceedings

³⁰ ECtHR [GC] 28 July 1999, *Immobiliare Saffi v. Italy* (appl. no. 22774/93), § 42.

³¹ ECtHR [GC] 8 June 2006, *Sürmeli v. Germany* (appl. no. 75529/01), § 105-108.

In legal systems where the Convention has the status of domestic law, it is directly applicable by some or all courts in the course of ordinary legal proceedings. This allows persons claiming that their Convention rights had been violated by the act or omission of a public authority to seek a remedy before any domestic court or tribunal competent to address the case. This would, for instance, be the case in monist legal systems. In some States Parties, like the Netherlands, the Convention also takes precedence over national law. In this type of system, self-executing treaty provisions such as Convention rights are immediately enforceable by the courts.

As an illustration, in Norway, the Convention is incorporated into national law by the Act on the Strengthening of the Position of Human Rights in Norwegian Law of 21 May 1999 (Human Rights Act). Under Section 3 of this Act, provisions of incorporated human rights conventions shall prevail in the event of a conflict with provisions of national legislation. Convention provisions are directly applicable and may be invoked directly before all Norwegian courts. A court may consider whether a provision of national legislation is in conflict with a provision of a human rights convention in a case before it but is not competent to declare a provision of internal law is incompatible in general with human rights provisions.

Similarly, under Article 152 § 4 of the Slovak Constitution, the interpretation and application of constitutional laws, laws and other generally binding legal regulations must be in conformity with the constitution; and under Article 154 (c) § 1, the respective international treaties, including the Convention, shall have precedence over laws if they give a wider scope to constitutional rights.

In France, the Convention has the status of higher law in accordance with Article 55 of the constitution of 4 October 1958, which provides that “treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party”. Any applicant may rely before an ordinary domestic court on the rights and freedoms set forth in the Convention, which are given direct effect.

A similar system exists, for example, in Austria, due to the constitutional rank of the Convention.

In Sweden, the Supreme Court has developed a practice according to which damages can be awarded for violations of the Convention. Claims for damages for alleged violations of the Convention may be submitted to the Chancellor of Justice. It is also possible to make such a claim for damages directly before the general courts, without having turned to the Chancellor of Justice.

A few final considerations

Obviously, in order to guarantee full implementation of the Convention acquis in the domestic legal order, it is advisable for all branches of the State, including national courts and tribunals, to have regard to the Court's settled interpretation of the Convention in cases against all High Contracting Parties. The effectiveness of a domestic remedy can be significantly enhanced if it is able to respond to the Court's evolving interpretation of the Convention without waiting for this to be specifically reflected in the finding of a violation against the relevant High Contracting Party. When conducting proceedings and formulating judgments, domestic courts could (and should?) take into account the principles of the Convention. In many national legal systems, it is not necessary for a litigant to provide a translation of a Court judgment being relied upon in domestic proceedings.

For example, in the United Kingdom, a court or tribunal, in deciding a question that has arisen in relation to the Convention rights as they have been incorporated into national law, is obliged to have regard to (but is not formally bound by) the jurisprudence of the Court, which in practice means that domestic courts and tribunals follow the Court's interpretation unless there is a particular reason to depart from it.

The German Federal Constitutional Court (Bundesverfassungsgericht) has effectively raised the ECHR and the Strasbourg jurisprudence to the level of constitutional law. According to the Constitutional Court, the Convention serves as an "aid to interpretation" of the constitution's fundamental rights and the rule of law principles.

A similar approach is taken by Austrian authorities and courts.

Under Article 93 of the Constitution of the Netherlands, international treaties become binding upon publication. Article 94 of the constitution states that statutory regulations in force within the Kingdom will not be applicable if their application conflicts with the provisions of treaties that are binding on all persons. Domestic courts dealing with human rights issues do so in light of the Convention, looking not only into the decisions of the Court against the Netherlands, but reading into the provisions of the Convention the whole *acquis* of the Court: Convention rights should be interpreted in line with the Court's interpretation.

Retroactivity of new remedies, particularly those designed to deal with systemic or structural problems, can also help significantly. In fact, whereas the Court will normally assess exhaustion of domestic remedies at the date of application, it may depart from this rule when taking note of the implementation of new effective remedies.